



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-376

FRED PABST, JR., Appellant,
v.
VERMONT COMMISSIONER OF TAXES,
Appellee

On Appeal from the Supreme Court of the
State of Vermont

STATEMENT OPPOSING JURISDICTION
AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OPPOSING JURISDICTION
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The Appellee in the above-entitled case moves the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Vermont Supreme Court on the ground that this appeal presents no substantial Federal question.

SUMMARY OF THE ISSUES

In 1970 the Vermont Legislature enacted a Vermont gift tax imposed on Vermont taxable gifts made on or after January 1, 1971. The Vermont gift tax is measured by 30% of Federal gift tax liability.

On January 1, 1971, the Appellant's marginal Federal gift tax rate was determined by the cumulative total of his pre-1971 taxable gifts, which reflected the fact that the Appellant had previously claimed his \$30,000 lifetime exemption. Accordingly, the Federal tax rate applicable to the Appellant's 1971 taxable gifts and, therefore, his 1971 Federal gift tax liability, reflected his Federal gift tax history. Because the Appellant's Vermont gift tax was measured by 30% of his Federal gift tax liability, his Vermont gift tax likewise reflected his pre-1971 Federal gift tax history. In a similar manner, the Appellant's 1972 and 1973 Vermont gift tax liabilities reflected his pre-1971 Federal gift tax history.

Based on the fact that his Vermont gift tax liabilities were different from those of a hypothetical taxpayer making identical Vermont taxable gifts but having a different Federal gift tax history, the Appellant claims that the Vermont law violated his rights guaranteed under the United States Constitution. Specifically, the Appellant claims that the Vermont gift tax is retroactive and that its incorporation by reference of the Federal gift tax law deprives him of his property without due process of law. The Appellant also claims that because the decision of the Vermont Supreme Court from which he appeals is legislative in nature the decision itself violates his Federally guaranteed right to due process of law. Finally, the Appellant claims that both the legislative nature of the decision below and the reference to Federal tax laws incorporated in the Vermont gift tax law violate his Federally guaranteed right to a republican form of government.

ARGUMENT

The Decision Below is Supported by Independent and Adequate Non-Federal Grounds. This Court has consistently required, as a prerequisite to accepting jurisdiction, that a substantial Federal question be properly raised in the proceedings below and that a decision on the Federal question was necessary to the determination of the Court below. To be properly raised, claims presenting Federal questions must be brought to the attention of the lower court with fair precision and in due time. Street v. New York, 394 U.S. 576, 584 (1969).

In determining whether a properly raised Federal question was necessarily decided by the the court below, this Court has required that the Federal question be clearly distinguished from similar state questions at issue. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865-6 (1974). Where adequate and reasonable state grounds are asserted, and the particular Federal question is not clearly raised, jurisdiction has been declined. As this Court said in Durley

v. Mayo, 351 U.S. 277, 281:

"..., petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below."

It is respectfully suggested that on the record before this Court, independent, adequate and reasonable state grounds for the decision below are presented. Furthermore, the Appellant has failed to properly raise in the proceedings below some of the Federal questions asserted on this appeal.

1. The decision of the Vermont Supreme Court that the Vermont gift tax is not unconstitutionally retroactive is based on the Vermont Constitution.

The Appellant argued in the Vermont Supreme Court that "the Vermont gift tax law violates the due process provisions of the Vermont and Federal Constitutions." Appellant's Reply Brief, at page 1. There is nothing in the record to support the conclusion that the Appellant brought to the attention of the court below, with fair precision, his claimed

right to Federal due process as distinguished from state due process.

Furthermore, the state constitutional grounds supporting the decision below are clearly independent, adequate and reasonable. While the Vermont Constitution contains no article which paraphrases §1 of the XIVth Amendment, the guarantees of due process of law are secured under Chapter 1, Articles 4, 9 and 10. While the Appellant's Jurisdictional Statement suggests that the decisions below focused on §1 of the XIVth Amendment, a careful reading of that decision reveals no differentiation between due process rights arising under the Federal Constitution and due process rights arising under the state constitution.

It is respectfully suggested that the Court should decline jurisdiction on the additional ground that any substantial Federal question presented has been previously decided by this Court. A gift tax is a transaction tax. Bromley v. McCaughn, 280 U.S. 124 (1929). Because the Vermont tax at issue was imposed only

on gift transactions occurring after its effective date, the tax is not retroactive within the holdings of Blodgett v. Holden, 275 U.S. 142 (1927) or Untermeyer v. Anderson, 276 U.S. 440 (1928). The Vermont Supreme Court correctly described the operation of the Vermont gift tax, stating:

"Under the Vermont gift tax law, pre-1971 gifts affect the rate at which post-1971 gifts will be taxed, but they are not themselves subject to a tax."

The decisions of this Court have consistently upheld the constitutionality of retroactive elements of otherwise valid taxes. As this Court said in United States v. Manufacturers National Bank of Detroit, Executor, 363 U.S. 194, 200 (1960):

"It is not material that the policies were purchased and the policy rights were assigned before the statute was enacted. The tax is not laid on the creation or transfer of the policy rights, and it 'does not operate retroactively merely because some of the facts or conditions upon which its application depends came

into being prior to the enactment of the tax.' United States v. Jacobs, supra (306 U.S. at 367)."

Although the tax upheld was the estate tax, the rationale applies with equal force to the companion tax on transfers of wealth, the gift tax.

2. The Authority of the Vermont Supreme Court to Construe a Statute to Avoid Unconstitutional Results is Clearly Derived from State Law.

Preliminarily, it should be noted that the Appellant's Motion for Reargument and supporting memorandum, raised no constitutional issues. For this reason alone this Court should decline jurisdiction as no issue can properly be asserted on this appeal which was not properly raised below.

Furthermore, the decision of the Vermont Supreme Court is supported by the Vermont Constitution and specifically based on 1 V.S.A. §215, a clearly independent, adequate and reasonable state ground.

While the Appellant here claims some unspecified Federally protected right to

due process was violated, neither the right transgressed nor the transgression complained of has been raised with fair precision either in its proceedings below or in Appellant's Jurisdictional Statement.

3. The Vermont Legislature was authorized to incorporate by reference provisions of the Federal gift tax law by the Vermont Constitution and Statutes.

In his initial petition to the Commissioner, the Appellant argued only that the Vermont Constitution prohibited the delegation complained of. He made no argument that a Federally protected right was involved, much less infringed upon. The Commissioner specifically rejected the Appellant's claim under the Vermont Constitution.

Appeals from a Commissioner's Determination are true appeals on the record, as distinguished from trials de novo. Rule 74(c) of the Vermont Rules of Civil Procedure and 3 V.S.A. §§815 and 809(e). It is established practice in Vermont that appellate review is limited to the record on appeal and that an appellate court will not consider issues

not raised in the proceedings below. As stated in Monti v. Village of Northfield, 135 Vt. 97, 99, 369 A.2d 1373 (1977):

"Points not raised in the proceedings before the lower court will not be considered for the first time on appeal. (Citation omitted.)"

See also LaFountain v. Vermont Employment Security Board, 133 Vt. 42, 48, 338 A.2d 468 (1974), and Laird Properties v. Mad River Corp., 131 Vt. 268, 282, 305 A.2d 562 (1973).

Contrary to this rule, on appeal the Appellant asserted a violation of Article IV, §4, of the United States Constitution. The Vermont Supreme Court never reached this newly asserted constitutional issue but rather dismissed the Appellant's claim for lack of standing based, in part, on its conclusion that the Appellant failed to show any protected right which was unfavorably affected. It is respectfully suggested that the Appellant's argument is foreclosed, because he failed to properly raise the issue below.

Even if this issue was properly raised, the decision below is clearly governed by the Vermont Constitution,

Chapter I, Article 15, which provides:

"The power of suspending the laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this Constitution, or the Legislature shall provide for."

Furthermore, Chapter II, Articles 1, 2 and 3, of the Vermont Constitution specifically distribute and delegate the powers of government among the Legislative, Executive and Judiciary branches. Because of the framework therein provided, the question of delegation is purely a local matter.

Article 4, §4 of the U.S. Constitution has no application to this case.

As noted in Sections 2 and 3 of this Motion, supra, the Appellant failed to properly raise any Federal constitutional issue to support his claim of unconstitutional delegation or the unconstitutional judicial legislation by the decisions below.

Even if consideration of Article 4, §4 of the United States Constitution is

properly before this Court, Chapter 1, Articles 5 and 15 of the Vermont Constitution, which assure comparable guarantees, provide an adequate, independent and reasonable state grounds for the decision below.

Additionally, as Appellant has noted, the Court has been reluctant to involve itself in issues arising under the "guarantee provision." Jurisdictional Statement at page 15. It is respectfully submitted that the issues presented by this case are not such as to compel the Court to abandon its traditional approach to petitions based on Article IV, §4, of the United States Constitution.

CONCLUSION

Wherefore, Appellee respectfully submits that no substantial Federal question is presented by this appeal and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Vermont Supreme Court.

Respectfully submitted,

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